STATE OF MICHIGAN

IN THE SUPREME COURT

SHAKEETA SIMPSON, as Personal Representative of THE ESTATE OF ANTAUN SIMPSON,

Plaintiff-Appellee,

and

SHAKEETA SIMPSON, Individually,

Plaintiff.

-vs-

ALEX PICKENS, JR. AND ASSOCIATES, M.D., P.C., a Michigan corporation, d/b/a PICKENS MEDICAL CENTER, BRIGHTMOOR GENERAL MEDICAL CENTER INCORPORATED, a Michigan corporation, d/b/a BRIGHTMOOR-PICKENS MEDICAL CENTER, ALEX PICKENS JR., M.D., and LINDA S. HARTMAN, P.A.,

Defendants-Appellants,

Supreme Court No. 152036

Court of Appeals No. 320443

Wayne County Circuit Court No. 13-000307-NH

_____/

PLAINTIFF-APPELLEE'S RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

MARK GRANZOTTO, P.C.

MARK GRANZOTTO (P31492)
Attorney for Plaintiff-Appellee
2684 Eleven Mile Road, Suite 100
Berkley, Michigan 48072
(248) 546-4649

THE THURSWELL LAW FIRM, PLLC

GERALD E. THURSWELL (P21448)
ARDIANA CULAJ (P71553)
Attorney for Plaintiff-Appellee
1000 Town Center, Suite 500
Southfield, MI 48075
(248) 354-2222

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Cases **Page**

Statutes

Other Authorities

STATEMENT OF QUESTIONS PRESENTED

I. SHOULD THIS COURT DENY DEFENDANTS' APPLICATION FOR LEAVE TO APPEAL SINCE THE COURT OF APPEALS CORRECTLY CONCLUDED THAT PLAINTIFF HAS A VIABLE CAUSE OF ACTION UNDER MICHIGAN'S WRONGFUL DEATH ACT, MCL 600.2922?

Plaintiff-Appellee says "Yes."

Defendants-Appellants say "No."

STATEMENT OF FACTS

This is a medical malpractice action arising out of the June 2010 death of a fetus, Antaun Simpson.

Antaun's mother, Shakeeta Simpson, had pregnancies in 2001 and 2008. Both of these pregnancies resulted in premature deliveries and the deaths of her babies. Complaint, ¶¶10-16. After the second of these pregnancies, the records of her physician, Dr. Alex Pickens, identified an incompetent cervix as the most likely cause of Ms. Simpson's loss of her pregnancies. Complaint, ¶17.

Dr. Pickens' plan was to place a cerclage, a standard procedure to treat cervical insufficiency, if Ms. Simpson became pregnant again. However, when Ms. Simpson became pregnant with Antaun in 2010, Dr. Pickens never appeared for any of her prenatal visits and he failed to place a cerclage or refer Ms. Simpson to another OB/GYN who could have done so.

Antaun Simpson was only 18.2 weeks gestation and nonviable when he was delivered on June 4, 2010.

Ms. Simpson filed this action in the Wayne County Circuit Court in January 2013. As originally pleaded, the case had two distinct components. First, the complaint stated a wrongful death action on behalf of the Estate of Antaun Simpson, of which Ms. Simpson was the Personal Representative. Second, Ms. Simpson stated a claim for damages on her own behalf.

In August 2013, the defendants filed a motion for partial summary disposition addressed solely to the wrongful death claim. In that motion, the defendants argued that plaintiff could not succeed on her wrongful death act cause of action because the negligence claimed in the case involved solely omissions on the part of the defendants. Defendants argued in their motion that

summary disposition was in order because an affirmative act of negligence was necessary to support such a claim. In making this argument, defendants relied on language contained in MCL 600.2922a and this Court's 2012 decision construing that statute, *Johnson v Pastoriza*, 491 Mich 417; 818 NW2d 275 (2012).

In response to defendants' argument, Ms. Simpson cited to the language of the wrongful death statute, MCL 600.2922, which provides a cause of action in any case resulting in death "caused by wrongful act, negligence or fault of another." Thus, because the wrongful death statute applies where the defendants' negligence consists of either acts or omissions, Ms. Simpson argued that partial summary disposition was not appropriate on her wrongful death claim.

The circuit court held oral argument on defendants' motion for partial summary disposition on December 19, 2013. At the conclusion of that hearing, the circuit court ruled in defendants' favor, holding that Ms. Simpson's wrongful death claim had to meet the requirements of MCL 600.2922a. Since the wrongful death claim was based on the defendants' omissions, as opposed to their affirmative acts of negligence, the circuit court ruled that partial summary disposition was appropriate on that claim.

A written order granting partial summary disposition on the wrongful death claim was entered on January 24, 2014. The parties later stipulated to the dismissal of Ms. Simpson's individual claim for damages. Ms. Simpson then appealed to the Court of Appeals, challenging only the circuit court's dismissal of her cause of action under the wrongful death statute.

A panel of the Court of Appeals issued its decision in this case on June 16, 2015. Citing MCL 600.2921, the panel recognized that "[b]ecause it was alleged that the injuries to the nonviable fetus resulted in death, this action had to be brought under the wrongful-death act, MCL 600.2922,

which 'provides the exclusive remedy under which a plaintiff may seek damages for a wrongfully caused death.'" Opinion (Defendants' Application Exhibit 1), at 3.

The Court of Appeals went on to hold that, as a cause of action under the wrongful death act, not under §2922a, plaintiff could proceed on a medical malpractice claim that is predicated on the defendants' negligent omissions:

> In summary, Simpson brought a wrongful-death action on behalf of her decedent and it was grounded in medical malpractice. This action was not brought pursuant to MCL 600.2922a and it need not be considered a statutory cause of action brought under MCL 600.2922a. Therefore, Simpson was not required to allege that defendants committed an affirmative or positive act that caused her decedent's death in order to state a claim under MCL 600.2922. To the contrary, under the wrongful-death statute, MCL 600.2922(1), a cause of action may be brought when death "is caused by wrongful act, neglect, or fault of another...."
>
> *Id*., at 6.

The defendants now seek leave to appeal from the Court of Appeals June 16, 2015 decision.

ARGUMENT

I. THE COURT SHOULD DENY DEFENDANTS' REQUEST TO REVIEW THE COURT OF APPEALS JUNE 16, 2015 DECISION SINCE THAT COURT CORRECTLY DETERMINED THAT PLAINTIFF HAD A VIABLE CAUSE OF ACTION UNDER THE WRONGFUL DEATH ACT.

A. The Relevant Statutes

The legal issue raised in defendants' application for leave concerns the circumstances in which a party may sue for injuries resulting from the death of a fetus. This issue involves the interplay between three successive Michigan statutes.

The first of these statutes is MCL 600.2921, which provides that "[a]ctions or claims for injuries which result in death shall not be presented after the death of the injured person except pursuant to the next section."

The "next section" referred to in §2921 is MCL 600.2922, the statute commonly referred to as Michigan's wrongful death act. This Court, consistent with §2921, has recognized that the wrongful death act "provides the exclusive remedy under which plaintiff may seek damages for a wrongfully caused death." *Jenkins v Patel*, 471 Mich 158, 164; 684 NW2d 346 (2004). MCL 600.2922(1) provides:

> (1) Whenever the death of a person, injuries resulting in death, or death as described in section 2922a shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or death as described in section 2922a, and although the death was caused under circumstances that constitute a felony.

MCL 600.2922(1).

The third statute of importance in this case is MCL 600.2922a, which at present provides:

> (1) A person who commits a wrongful or negligent act against a pregnant individual is liable for damages if the act results in a miscarriage or stillbirth by that individual, or physical injury to or the death of the embryo or fetus.
>
> (2) This section does not apply to any of the following:
>
> (a) An act committed by the pregnant individual.
>
> (b) A medical procedure performed by a physician or other licensed health professional within the scope of his or her practice and with the pregnant individual's consent or the consent of an individual who may lawfully provide consent on her behalf or without consent as necessitated by a medical emergency.
>
> (c) The lawful dispensation, administration, or prescription of medication.
>
> (3) This section does not prohibit a civil action under any other applicable law.

B. The History

To fully understand the relationship between these three statutes, a brief bit of history is important.[1]

From its initial enactment in 1848, Michigan's wrongful death statute has specified that an action would lie for tortious acts or omissions that result in the death of a *person*. However, as early as 1975, the Court of Appeals placed a significant limitation on the application of this statute in cases involving the death of a fetus. In *Toth v Goree*, 65 Mich App 296; 237 NW2d 297 (1975), the Court of Appeals held that a nonviable fetus was not a "person" for purposes of §2922 and, as a result, there could be no wrongful death action arising out of prenatal death occurring prior to viability. *Cf.*

[1]The history that follows is derived from four sources. Much of this history was covered in the Court's recent decision in *Johnson v Pastoriza*, 491 Mich 417; 818 NW2d 279 (2012). Some of this history is taken from a 2004 Michigan Bar Journal article, Dena Marks and John Marks, *Prenatal Torts In Michigan*, 83 MBJ 28 (2004). Finally, both the House Analysis of the 2005 bill that amended the wrongful death act and the Senate Analysis of that same bill contain a recap of this history. *See* Exhibits 4,D and 4,E to defendants' application for leave.

O'Neill v. Morse, 385 Mich 130; 188 NW2d 785 (1971) (recognizing an action under the wrongful death act for a fetus who dies post-viability).

This Court did not definitively weigh in on the question of whether the death of a nonviable fetus could be the basis for a wrongful death claim until 1997 when it affirmed *Toth*'s holding in *Thomas v Stubbs*, 455 Mich 853; 564 NW2d 463 (1997). Thus the *Thomas* ruling confirmed that a fetus was not a person for purposes of the wrongful death statute.

Even as *Thomas* was working its way through the court system, the Michigan Legislature was attempting to pass a law that would have placed a fetal death within the coverage of the wrongful death statute. *See* D. Marks and J. Marks, *Prenatal Torts In Michigan,* 83 MBJ 28, 29-30 (2004). In 1997, a bill was proposed to amend the wrongful death statute to provide a remedy for the death of an "individual." Under the terms of that proposed amendment to the wrongful death act, the term "individual" would have been defined broadly enough to include a fetus at any stage post-conception. This proposal to amend §2922 did not pass as it became bogged down in the politics of the rights of the unborn. Marks, at 29-30.

In 1988, after passage of the proposed amendment of the wrongful death statute to include death to fetuses proved politically unfeasible, the Michigan Legislature responded to this Court's ruling in *Thomas* by passing a new statute, separate from the wrongful death statute. That new statute was MCL 600.2922a. As originally passed that statute provided in pertinent part:

> (1) A person who commits a wrongful or negligent act against a pregnant individual is liable for damages if the act results in a miscarriage or stillbirth by that individual, or physical injury to the embryo or fetus.
>
> * * *
>
> (3) This section does not prohibit a civil action under any other applicable law.

Thus, as originally written, §2922a described two types of death, miscarriage and stillbirth. Moreover, even in its original form, §2922a indicated that it was not meant to preempt any other available legal remedy since it did not "prohibit a civil action under any other applicable law." In 2002, §2922a was amended to include a third type of death - "the death of the embryo or fetus."[2]

In 2003, the Court of Appeals issued a decision in *McClain v University of Michigan Board of Regents*, 256 Mich App 492; 665 NW2d 484 (2003). *McClain* was a medical malpractice action brought by a mother following the death of a 17 ½ week old fetus. *McClain* was not a wrongful death action brought on behalf of a deceased fetus. Despite that fact, the *McClain* panel made note of the fact that, based on this Court's decision in *Thomas*, no wrongful death claim could be brought on behalf of a fetus because a fetus is not a "person" for purposes of that act. *McClain*, 256 Mich App at 495. The *McClain* Court further reiterated that "[t]he wrongful death act stands as the exclusive remedy for injuries resulting in death." *Id*.

The *McClain* Court went on to rule that the plaintiff-mother could not recover for the consortium injuries she sustained as a result of losing her child. In reaching this result, the *McClain* panel relied exclusively on common-law principles governing a parental consortium claim associated with the loss of a child. *See Sizemore v Smock*, 430 Mich 283; 422 NW2d 666 (1988). The Court in *McClain* offered no discussion as to whether loss of consortium damages might be recoverable under §2922a, the act passed by the Legislature fifteen years before.

---

[2]According to the Legislative analysis, this 2002 amendment of §2922a to include "death of an embryo or fetus" was necessary to clarify the law following a 2000 Oakland County Circuit Court ruling that a husband who killed his pregnant wife could not be prosecuted under the criminal equivalent of §2922a, MCL 750.90a, because his conduct did not result in a miscarriage or stillbirth. House Analysis (Defendants' Application Exhibit 4,D), at 1; Senate Analysis (Defendants' Application Exhibit 4, E), at 2. *See People v Fletcher*, 260 Mich App 531, 551-553; 679 NW2d 127 (2004).

While the Court of Appeals decision in *McClain* never addressed §2922a and its provision for a cause of action arising out of the death of a fetus, the analysis employed in the *McClain* case cast some doubt as to the viability of such a claim. If, as the panel held in *McClain*, the wrongful death act represented the exclusive remedy for injuries resulting in death and the wrongful death act did not encompass fetal death because fetuses were not persons under that statute, there was some degree of doubt post-*McClain* whether the death of a fetus could give rise to a claim despite the existence of §2922a.

The Michigan Legislature reacted to the *McClain* decision. This time, the Legislature decided to amend the wrongful death statute to make it completely clear that the remedies provided in that statute would be applicable in a case involving the death of a fetus at any stage of gestational development. The Legislature accomplished this result not by expanding the definition of "person" to include the unborn. Instead, the Legislature elected in 2005 to amend the first subsection of §2922 by twice adding to it the words "or death as described in section 2922a." Thus, accenting the words added to the wrongful death act by the 2005 amendment, §2922(1) in its present form provides:

> (1) Whenever the death of a person, injuries resulting in death, ***or death as described in section 2922a*** shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have liable, if death had not ensured, shall be liable to an action for damages, notwithstanding the death of the person injured ***or death as described in section 2922a***, and although the death was caused under circumstances that constitute a felony.
>
> MCL 600.2922(1) (emphasis added).

Finally, the history of these two statutes requires some discussion of this Court's decision in *Johnson v Pastoriza*, 491 Mich 417; 818 NW2d 275 (2012). *Johnson* was a medical malpractice

action arising out of the death of a twenty-week-old fetus. The malpractice alleged in *Johnson* was identical to that which is the subject of this case - an obstetrician's failure to perform a cerclage on an expectant mother with a history of an incompetent cervix.

The malpractice alleged in *Johnson* occurred in November 2005. That date was significant because it was before the 2005 amendment of the wrongful death statute went into effect. Thus, the professional negligence in *Johnson* took place before §2922(1) incorporated the phrase "death as described in section 2922(a)."

Two issues were presented to this Court in *Johnson*. First, the plaintiff contended that the 2005 amendment to the wrongful death statute applied retroactively and, therefore, controlled the determination of whether the plaintiff had a valid claim under that statute. Alternatively, the plaintiff contended that she was entitled to recovery under §2922a.

The Court resolved both of these issues against the plaintiff. It held that the 2005 amendment of the wrongful death statute could not be applied retroactively. 491 Mich at 429-434. This meant that the law that predated the 2005 amendment of the wrongful death statute would control. Since under the common-law rule that predated that amendment a nonviable fetus was not a person for purposes of the wrongful death statute, the plaintiff in *Johnson* had no right to recover under §2922.

On the question of plaintiff's claim for relief directly under §2922a, the Court held in *Johnson* that the language of that statute, which speaks to the commission of "a wrongful or negligent act," required an affirmative act of negligence, not a mere omission. 491 Mich at 436-437. Because the professional negligence alleged in *Johnson* was based solely on the defendant's failure to act, *i.e.* the failure to perform the cerclage procedure, the Court ruled in *Johnson* that plaintiff had no basis for recovery under §2922a.

At the same time the Court in *Johnson* held that §2922a was confined to cases involving affirmative acts of negligence, it also recognized that the operative language in the wrongful death act was different. Comparing the two statutes, the *Johnson* Court found that the Legislature's reference in §2922a to "wrongful or negligent act," did not include "the more expansive terms 'neglect' and 'fault of another' that it included in MCL 600.2922(1) *which permit liability on the basis of omissions*." 491 Mich at 437 (emphasis added). Thus, the Court explicitly recognized in *Johnson* that an action premised on the wrongful death act could be based on negligence associated with a defendant's failure to act.

C. The Court of Appeals Decided This Case Correctly

In *Johnson*, the Court held that the wrongful death act contains language that encompasses both negligent acts and negligent omissions. Despite the fact that Ms. Simpson is bringing this action solely under the wrongful death act and despite *Johnson*'s holding that actions under that act may be based on negligent omissions, the defendants have argued in this case that plaintiff's cause of action is subject to §2922a and its requirement that claims under that statute can only be predicated on affirmative acts of negligence.

The defendants are wrong in claiming that this case brought under §2922 is subject to the limitation of affirmative acts of negligence imposed in §2922a. The Court of Appeals decided this case correctly and, for that reason, this Court should decline defendants' request to review this case.

This Court's holding in *Johnson* that §2922a allows recovery only in cases involving active negligence formed the basis for the defendants' argument in support of their motion for partial summary disposition in this case. Defendants contend on the basis of the *Johnson* Court's construction of the scope of §2922a that the claims in this case, which involve the same type of

passive negligence as that involved in *Johnson*, cannot be the basis for recovery.

What is obviously different between this case and *Johnson* is that Ms. Simpson's claim as personal representative of the Estate of Antaun Simpson is one that is brought under the wrongful death statute, §2922, and not under §2922a. Moreover, this case differs from *Johnson* in that here there is no question that the post-2005 version of §2922(1) governs.

To repeat, this is how the wrongful death statute now reads following that 2005 amendment:

> (1) Whenever the death of a person, injuries resulting in death, *or death as described in section 2922a* shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have liable, if death had not ensured, shall be liable to an action for damages, notwithstanding the death of the person injured *or death as described in section 2922a*, and although the death was caused under circumstances that constitute a felony.
>
> MCL 600.2922(1), (emphasis added).

There are three types of death described in §2922a: miscarriage, stillbirth and the "death of the embryo or fetus." Notably, it is "death as described in section 2922a" that is incorporated into §2922(1); it is not the *manner* in which that death is caused that has become part of §2922(1). The Legislature could have written §2922 in such a way that it would have included within its coverage "a death as caused in a manner described in section 2922a." Such language would offer support for the position that defendants take in this case since it would have required that the mechanism by which a death occurs under §2922a - *i.e.,* through the commission of an affirmative wrongful or negligent act - would be incorporated into the wrongful death statute.

But, that is not how the 2005 amendment to the wrongful death statute was drafted. That amendment was not written as a wholesale incorporation of §2922a into the wrongful death statute,

nor did that amendment require that the *manner* of death be as prescribed in §2922a. All that §2922(1) provided after its amendment in 2005 is that any death "as described in section 2922a" would now become actionable in a wrongful death action.

The Court of Appeals correctly grasped the significance of the 2005 amendment to §2922. The panel ruled in its June 16, 2015 decision:

> There is no ambiguity; the "death as described in section 2922a" is the death of an embryo or fetus. No other "death" is described in § 2922a. The statutory language is not equally susceptible to more than this single meaning. The amendatory language merely differentiates between the death of "a person" as construed under MCL 600.2922 and the deaths of an embryo or fetus. According to the 2005 amendment, the first requirement for a wrongful-death action—that there be a death—is satisfied when the death is of an embryo or fetus. And that is the extent of the impact this amendment had on the wrongful death statute; it merely expanded the scope of actionable deaths to include the death of an embryo or fetus. The trial court's interpretation of the amendatory language as incorporating the entirety of one statute into the other statute contravenes our long-standing rules of statutory interpretation that: statutory language is to be read and understood in its grammatical context; words are to be accorded their plain and ordinary meaning; and no word should be treated as surplusage or rendered nugatory.
>
> Opinion (Defendants' Application Exhibit 1), at 5.

The history of the 2005 amendment of §2922 discussed above provides insight into the appropriate interpretation of this language. The 2005 amendment was passed after the Court of Appeals 2003 decision in *McClain* which cast some doubt on §2922a's coverage while reaffirming that §2922 in its pre-2005 form did not provide for a cause of action arising out of the death of a fetus. As expressed in the Senate Analysis of the 2005 proposal to amend the wrongful death act, the decision in *McClain* "contributed to uncertainty among the circuit courts and within the legal community as to whether Section 2922a allows actions on behalf of an embryo or nonviable fetus."

Senate Analysis (Defendants' Application Exhibit 4,E), at 1.[3]

The Legislature recognized post-*McClain* that if it was to eliminate this uncertainty and ensure a right to recover for the death of a fetus, it would have to expand the reach of the wrongful death act. It could do so directly by expanding the definition of the word "person" as used in §2922(1) to include a fetus. This proved to be a politically nonviable option because it would have placed the Legislature in the maelstrom of controversy surrounding the legal rights of the unborn.

So, rather than expanding the scope of the wrongful death statute by expanding the definition of *life*, the Legislature elected to reach a new class of cases by expanding the types of *deaths* that would fall within the coverage of that statute. Thus, the Legislature amended §2922(1) in 2005 to encompass not only "the death of a *person*," but also "death as described in section 2922a."

The essence of the defendants' argument in this case is that the phrase "death as described in section 2922a" incorporates into §2922 the entirety of §2922a, including the mechanism of that death as well as the three exceptions to liability provided in §2922a(2). Thus, as defendants put it in their brief: "A death 'as described' in MCL 600.2922a is a miscarriage, stillbirth, or the death of an embryo or fetus resulting from a wrongful or negligent act committed against the pregnant individual." Defs' Brf, at 12.

The implausibility of the defendants' position can be demonstrated by taking the defendants at their word and substituting into §2922(1) the language that defendants insist should be incorporated into that statute from §2922a. According to defendants' argument, here is how

---

[3]To a considerable extent, this uncertainty over the coverage of §2922a was legislatively self-inflicted. In enacting this statute to provide for a cause of action for fetal death, the Legislature never quite came to grips with the significance of §2921, the statute that categorically indicated that all death cases had to be pursued in conformity with "the next section," *i.e.* §2922.

§2922(1) should be read:

> Whenever the death of a person, injuries resulting in death, or a miscarriage, stillbirth, or the death of an embryo or fetus resulting from a wrongful or negligent act shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or a miscarriage, stillbirth, or the death of an embryo or fetus resulting from a wrongful or negligent act, and although the death was caused under circumstances that constitute a felony.

There are two points to be made from this substitution of the language from §2922a into §2922 that defendants propose. First, as noted previously, the phrase "death as described in §2922a" is used not once but twice in §2922. What is significant about the latter of these two uses of this phrase is that it has nothing whatsoever to do with the mechanism of death, it only concerns the *fact* of death.

The final phrase of §2922(1) is, in essence, a reaffirmation of the major feature of the wrongful death act for the 160 or so years of its existence. At common law, there was no cause of action for tortious conduct that resulted in the death of a person nor did the common law permit the survival of such actions. *In Re Olney's Estate*, 309 Mich 65, 72; 14 NW2d 547 (1944). The final clause of §2922(1) establishes that a party whose tortious conduct results in the death of a person is to be held liable for that conduct *notwithstanding that party's death*.

Prior to 2005, §2922(1) conveyed the fact that a cause of action existed under the wrongful death act "notwithstanding the death of the person . . ." This clause was amended in 2005 when §2922(1) "incorporated" §2922 such that it now provides that tort liability may be imposed "notwithstanding the death of the person *or death as described in section 2922a*." What is significant about this second reference to §2922a in §2922(1) is that all that is being conveyed in this

final clause is that recovery will be allowed under the wrongful death act even though the person or the fetus has *died*. The method of the fetus's death, *i.e.* whether it resulted from an affirmative act of negligence or a negligent omission, is of no relevance. What is obvious from §2922(1)'s second reference to "death as described" in §2922a, is that it is a reference solely to the death itself, *i.e.* the miscarriage, stillbirth or, more generally, the death of a fetus.

Since the second reference in §2922(1) to a "death as described in section 2922a" is merely an incorporation of the types of death provided in that latter section, it stands to reason that the same should be true of the first use of that same phrase in §2922(1).

There is a second point to be drawn from the above-quoted re-formulation of §2922(1) based on the argument offered by defendants. If defendants were correct in their conception of the interplay between §2922(1) and §2922a(1), it would mean that this provision has sequentially two different statements as to the negligence necessary to make out a claim, one of which limits coverage to affirmative acts of negligence, one of which does not. If defendants were correct, the first sentence of §2922(1) would be left in the following confused state: whenever the death of a fetus results from an affirmative act of negligence and that death shall be caused by either an affirmative act of negligence or a negligent omission, liability will be imposed.

The wholesale incorporation of §2922a into §2922(1), including the type of negligence giving rise to such a claim, creates a statute that sets out two quite different mechanisms by which death might result, and poses a significant question as to which of these two statutes' descriptions of the negligence necessary to support such a claim would ultimately control.

In addition to their discussion of the text of the relevant statutes, defendants offer a variety of reasons why, in their view, the Court of Appeals erred in its interpretation of these statutes. Many

of the additional arguments that defendants offer fail to come to grips with another provision in §2922a. Subsection (3) of that statute specifically provides that "[t]his section does not prohibit a civil action under any other applicable law." This Court recognized the implication of this language in *Johnson* when it indicated that §2922a "is separate from the wrongful-death statute. . ." 491 Mich at 422-423. Thus, to the extent that the wrongful death act incorporates specific provisions of §2922a, the statutes must be read together. But, the Michigan Legislature has specifically decreed in §2922a(3) that a cause of action under §2922a does not preclude any other type of action - including a claim under the wrongful death act.

The defendants contend, for example, that the wrongful death act works as a "filter" through which a cause of action under §2922a operates. On that basis, they contend that the entirety of §2922a is incorporated into §2922, including §2922a's requirement of an affirmative act of negligence.

It is true that this Court has on at least one occasion indicated that §2922 operates as "a 'filter' through which the underlying claim may proceed." *Wesche v Mecosta County Road Comm.*, 480 Mich 75, 88; 746 NW2d 847 (2008). There are, however, a number of things wrong with defendants' "filter" argument. In *Wesche*, the Court indicated that the plaintiff's underlying claim" is "filtered" through the wrongful death act. The "underlying claim" in *Wesche* was plaintiff's cause of action against a governmental entity under MCL 691.1405. *Cf. Hardy v Maxheimer*, 429 Mich 422; 416 NW2d 299 (1987) (plaintiff's underlying claim of ordinary negligence governs the statute of limitations in a wrongful death act).

Here, Ms. Simpson's "underlying claim" is medical malpractice. *See Shinholster v Annapolis Hospital*, 471 Mich 540, 559; 685 NW2d 275 (2004) ("we hold that the noneconomic damage cap

found in MCL 600.1483 applies to a wrongful death action based on an underlying claim of medical malpractice."); *see also Jenkins v Patel*, 471 Mich 158; 648 NW2d 346 (2004). It is that medical malpractice claim that is presumably "filtered" through the wrongful death act.

Moreover, it is worth noting that since this Court's decision in *Johnson*, Ms. Simpson has no right to recover under §2922a under the facts of this case. Thus, defendants' "filter" argument reduces to the absurdity that Ms. Simpson's "underlying claim" that is to be "filtered" through the wrongful death act happens to be a claim that she does not even have.

There is no "filtering" to be done between §2922 and §2922a in the sense that this Court described in *Wesche*. These are two distinct statutes that, except for the "incorporation" into §2922 of the types of deaths described in §2922(1), operate independently of each other. *See* MCL 600.2922a(3).

In a similar vein, defendants argue that the Court of Appeals erred in this case in failing to read §2922 and §2922a "harmoniously." This search for "harmony" between §2922 and §2922a is a completely empty exercise. The Legislature passed §2922a as an alternative to the wrongful death act; that statute was never meant to displace the wrongful death statute. This fact is specifically demonstrated in §2922a(3). Thus, by its own terms, §2922a operates independently of the wrongful death statute, a point that this Court grasped in *Johnson.* 491 Mich at 422-423. As such, search for a "harmony" between the two was both pointless and inappropriate.[4] *Cf. Apsey v Memorial Hospital*,

[4]Moreover, if the goal of "harmony" between §2922 and §2922a were a legitimate one, it is far more logical to conclude that the limitations imposed on the type of actionable negligence recognized in §2922a, *i.e.* only affirmative acts of negligence, should give way to the more expansive definition of fault in §2922. Indeed, it is arguable that §2922a, insofar as it attempted to supply a potential cause of action for the death of a fetus, represented from the outset an empty gesture that was only corrected when §2922 was amended in 2005. In setting out a new statute in 1988 providing for a potential action arising out of the death of a fetus, the Legislature may not

477 Mich 120, 128-133; 730 NW2d 695 (2007) (finding that two statutes governing the same subject matter were legislatively designed to operate independently of each other).

Defendants further assert that the conflict they perceive between §2922 and §2922a should be resolved in favor of the latter under principles of construction that favor the more specific statute over the more general. However, where, as here, the Legislature has enacted two statutes that are by legislative decree operating independently of each other, the "conflict" that defendants perceive does not exist. *Cf. Apsey*.

Defendants further contend that, to allow Ms. Simpson to recover under the wrongful death act for negligent omissions that caused the death of her fetus would render §2922a nugatory. Since §2922a(1) represents legislative recognition that a cause of action exists for any physical injury to a fetus, even a physical injury short of death, it is obvious that there is no construction of the wrongful death act that could ever negate the entirety of §2922a.

Moreover, where the Legislature has established two statutes that are expressly made independent of each other, it is pointless to suggest that the provisions of one might never be invoked

---

have given full weight to the long-expressed judicial rule that "the wrongful death act provides the exclusive remedy under which a plaintiff may seek damages for a wrongfully caused death." *Jenkins*, 471 Mich at 164. More importantly, in enacting §2922a in 1988, the Legislature may not have fully taken into account its own statutory declaration that "[a]ctions or claims for injuries which result in death shall not be presented after the death of the injured person *except pursuant to [§2922]*." MCL 600.2921 (emphasis added). Thus, long before §2922a was adopted in 1988, the Michigan Legislature had a law in place that decreed that all cases arising out of a death had to be processed under §2922. Thus, it is far more reasonable to conclude that it took an amendment to §2922 to enshrine in Michigan law a cause of action for the death of a fetus - something that the Michigan Legislature did in 2005. Under this view of the law, it is far better to conclude that if either §2922 or §2922a must "give way" to the other as the circuit court viewed the two, it is much more logical to find that, on the subject of causes of action based on the deaths of fetuses, it is §2922a that should give way to the true exclusive remedy in wrongful death cases, §2922.

because of some inherent advantage in the other. *See Apsey*. The fact is that, following the legislative fits and starts that bring §2922 and §2922a to their present status, it may well be that practical considerations will dictate use of one over the other.[5] But the fact that one of these two independent statutes may be used more frequently (or even exclusively) over the other does not dictate the conclusion that the neglected or abandoned statute is rendered nugatory. *See Apsey.*

Defendants further cite legislative history as supportive of their position. The legislative history that the defendants rely upon unquestionably supports the view that, following the Court of Appeals decision in *McClain*, there was growing concern that the legislative "fix" that was embodied in the 1988 passage of §2922a was proving insufficient because the courts appeared to be looking solely to the wrongful death act. That is why in 2005 the Legislature decided to amend the wrongful death act itself and incorporated into that act the types of deaths described in §2922a.

But the Legislative history that defendants attach to their application provides no resolution of the fundamental question presented in this case - what portion of §2922a was incorporated into the wrongful death act in 2005. Thus, even if the types of legislative history that defendants offer were considered a valuable guide in the construction of statutory language, it is of no assistance here. *Cf Frank W. Lynch & Co v Flex Technologies, Inc.*, 463 Mich 578, 587; 624 NW2d 180 (2001) ("a legislative analysis is a feeble indicator of legislative intent and is therefore a generally impersuasive tool of statutory construction.").

---

[5]It is no big secret that one of the particular advantages for plaintiffs in the wrongful death act is that this statute provides for a form of damages that does not exist at common law. *Hawkins v Regional Medical Laboratories, PC*, 415 Mich 420, 436; 329 NW2d 729 (1982). While §2922a(1) makes a tortfeasor "liable for damages," there is no indication in that statute that these damages exceed those available under the common law. Thus, to the extent those two statutes overlap in a particular fact situation, it would not be particularly surprising if §2922a fell into disuse.

Finally, defendants raise the question of the impact of the Court of Appeals decision as it applies to the exceptions to §2922a liability contained in §2922a(2). That subsection of the statute provides three exceptions to the cause of action provided in that statute. Defendants argue that the Court of Appeals decision would have significant implications in future litigation other than this one.

Plaintiff would first note that the three exceptions to liability provided in §2922a(2) have no application to this case. As such, the question of whether these exceptions are "incorporated" into a wrongful death claim is not dispositive of any issue involved in this case and for that reason is not even raised in this case.

Furthermore, the defendants' argument fundamentally goes to the wisdom of the Michigan Legislature's actions in 2005 when it amended the wrongful death act as it did. The wisdom behind a particular legislative enactment is not for this Court to decide. *Petipren v Jaskowski,* 494 Mich 190, 212; 833 NW2d 247 (2013) ("The fact that a statute appears to be impolitic, unwise, or unfair is not sufficient to permit judicial construction."); *Jennings v Southwood*, 446 Mich 125, 142; 521 NW2d 230 (1994). If the legislative "fix" adopted in 2005 creates additional concerns that may not have been fully anticipated by the Michigan Legislature in 2005, these concerns should be addressed to the branch of state government with the power to re-write statutes.

RELIEF REQUESTED

Based on the foregoing, plaintiff-appellant, The Estate of Antaun Simpson, deceased by his Personal Representative and mother, Shakeeta Simpson, respectfully requests that this Court deny defendants' application for leave to appeal in its entirety.

MARK GRANZOTTO, P.C.
/s/ Mark Granzotto
MARK GRANZOTTO (P31492)
Attorney for Plaintiff-Appellee
2684 Eleven Mile Road, Suite 100
Berkley, Michigan 48072
(248) 546-4649

THE THURSWELL LAW FIRM, PLLC
/s/ Ardiana Culaj
GERALD E. THURSWELL (P21448)
ARDIANA CULAJ (P71553)
Attorney for Plaintiff-Appellee
1000 Town Center, Suite 500
Southfield, MI 48075
(248) 354-2222

Dated: October 1, 2015